

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 869 of 1987

and

SPECIAL CIVIL APPLICATION NO. 7219 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

HASAM IBRAHIM ABDUL LATIF SUPEDIWALA

Versus

BHAICHAND PRANLAL DHONEJA

Appearance:

MR PM RAVAL for Petitioner

MR SURESH M SHAH for Respondent No. 1

MR BG JANI for respondent No.3 in SCA7219/96

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 16/10/98

ORAL JUDGEMENT

1. Both the petitions are relating to same subject matter and integrally connected and therefore are decided together. There exists a Januhasan Charitable Trust at Dhoraji of which respondent No.4 is a trustee. The land in question admeasuring 26788-8-2-0 sq.yds was purchased by the trust at the rate of 0-04 annas per sq.yd. from

the erstwhile State of Gondal on 10.8.1940. The land is situated at village Doraji. At the back of grant along with the map of the site, a note was put up which reads as under: (Quotation in handwritten Gujarati)

2. A charitable hospital was constructed on part of the land. Some shops were also constructed for yielding income. However, major portion of the land was lying vacant. In June 1981, some communal riots took place in village Dhoraji in which the building of the hospital was severely damaged and was rendered incapable of being used. An application was moved to the Joint Charity Commissioner on 15.11.1983 by the Managing Trustee of the said trust seeking permission to sell 26.146.6 sq.yds. of open land. It was stated in the application that due to riots on 13.6.81, the hospital building consisting of about ten rooms including furniture, medical appliances had been destroyed. These properties have been ordered to be written off by the Charity Commissioner on the report being made in that behalf. It was pointed out that to construct a new building an amount of Rs.20.00 lakhs is estimated to be required, the trust having limited funds to meet these requirements needs this property to be sold. It was also pointed out that trust after selling the land may construct a new hospital elsewhere from the funds realised to be from the sale of the land in question. For the purpose of construction of new hospital it was pointed out that another plot of about 2400 sq.yds has been donated to the trust, at a different site near Dhoraji. Certain objections were filed to this application by respondent No.5 and two others for rejecting the permission. The Charity Commissioner after considering the objections fixed the minimum price at which offer for sale be invited at Rs.125/- per square yard. Thereafter on 16.3.84 a public notice for sale of the plot in question was issued which appeared in the daily newspaper Fool Chhaap of Rajkot. In response to that advertisement, the present petitioner offered highest price of Rs.45.00 lakhs. To the acceptance of this offer, two objections were raised, one by Patel Kadwa Arjan, who is respondent No.5 in Special Civil Application No. 869 of 1986, and another by D.R.Bhalra. Ultimately, vide his order dated 30.5.84, Jt. Charity Commissioner granted permission to sell the land in question for a sum of Rs.45 lakhs in favour of present appellant. Aggrieved with the grant of said permission, three persons, namely, Bhaichand Pranlal Dhinoja, Kishorekant Talekchand and Jayantilal Bachubhai Padalia, who are respondents Nos. 1 to 3 in Special Civil Application No. 869 of 1986, against the order of Jt. Charity Commissioner, before the Gujarat Revenue

Tribunal under Section 36 of the Bombay Public Trusts Act. The grant of permission was challenged on the ground firstly that land in question has been allotted at a concessional price only for the purpose of constructing a hospital thereon and it cannot be put to any other use, except with the permission of the competent officer for change of user, the sale would result in breach of condition of allotment. Secondly that there has been collusion between the Managing Trustee and the purchaser who are near relatives for which support was drawn from the fact that lesser percentage of the offered price has been deposited as earnest money than the usual practice, because the Managing Trustee and the purchaser are near relatives and that while earlier contract which the trustees has made on 21.10.83 before applying for permission of Charity Commissioner was for a sum of Rs.60.00 lakhs against which Rs.2.00 lakhs were paid as earnest money but the same has been returned by the trustees and now the property is being sold for much lesser amount at Rs.45.00 lakhs only. Thirdly, reason for selling the property and shifting the site of the hospital from the present place to another place is not well founded. Lastly, it was brought to the notice of the Tribunal that the Civil Suit pertaining to this dispute about shifting of hospital from the existing site to new site has been filed in the court of Extra Assistant Judge, Gondal wherein by way of interim injunction dated 27.12.84, the tenderer has been restrained from using the suit property for any other purpose than the purpose of running a hospital. Appeal against that order is pending in the High Court. Apart from contesting on merit, the respondents also raised question about locus standi of the appellants who had not raised objections earlier to the grant of permission by the Charity Commissioner, until before property was advertised for sale after overruling objections filed before him.

3. The question of locus standi was decided in favour of respondents Nos. 1 to 3, as they were found to be beneficiary of the public trust running the hospital. Tribunal also found after perusing the document of grant that Charity Commissioner was not entitled to interpret the condition on the letter of grant but that question ought to have been referred to revenue authorities. It was found by the Tribunal while considering the contention of the Jt. Charity Commissioner that there is no prohibition against transfer, that though it is true that a specific condition has not been laid down but it is equally true that the lands are to be used by the trust only for the purpose of hospital as laid down in

the condition and if the trust wants to sell it away for any other purpose other than hospital purpose, trust has to approach revenue authority for modification of the condition laid down in the Sanad. The condition for a specific purpose implies that it cannot be used for any other purpose by the trust, and therefore cannot be sold to any other person for other purposes. For these reasons the decision of the Joint Charity Commissioner in granting permission to sell the land was held to be liable to be set aside. The Tribunal also observed that before permission was granted, matter should have been referred to Collector.

4. The other conclusion to which the Tribunal reached was that before granting permission to the sale, the Charity Commissioner has not applied his mind properly, to the two basic questions relevant for considering application for permission to alienate property of any public trust, viz., (1) whether there is a compelling necessity to justify the alienation in question and (2) whether the proposed alienation is fair and does in any way adversely affect the interest of the trust. While accepting the case of the applicant that the hospital premises were severely damaged during communal riots during 1981 and it was required to be reconstructed. The Tribunal found that reason for shifting the site of hospital which was situated in the heart of city to a place outside city for the reason of the hospital being in a congested area was not found to be convincing. The Tribunal was also of the opinion that the Commissioner has not applied his mind to the question while considering that by sale of the entire land, a big amount may be realised whether the purpose of the trust for constructing a new hospital building can equally be achieved if the new building is constructed on a small portion of the land in question and extra available land with the trust may only be sold for the purpose of raising requisite funds, and that too only after seeking permission of the revenue authorities for change in the condition as to user of the land. The Tribunal also opined that the question has not been considered whether after proper permission from revenue authorities some more shops for remunerative purpose can be constructed on this land in addition to new hospital building on this very land to augment the income of the trust. For these reasons the permission granted by the Charity Commissioner for sale of the land in question to the present appellants was set aside by order dated 6.12.1985. That order is subject matter of challenge in Special Civil Application No. 869 of 1987.

5. When the matter was heard on earlier occasion, and arguments were raised on the issue of the requisite permission of the revenue authorities for modification in the condition as to user of the land in question and the question was also raised that in case the permission granted by the Jt. Charity Commissioner fails the question would arise for refund of Rs.9.00 lakhs and interest thereon of the petitioner which has been received by the trust and utilised for its own purposes, in pursuance of the permission granted by the Charity Commissioner, the Court was inclined to postpone further hearing of the matter and directed in the following terms on 2.2.1996:

"I am not inclined to enter into the controversy at this stage and before proceeding further it will be appropriate if Janu Hasan Charitable Trust approach the Revenue Authorities for proper order or direction as contemplated in the impugned order. The Janu Hasan Charitable Trust may approach to the concerned authorities within a period of two weeks from today. On filing such application, the Revenue Authority shall decide the matter within a period of one month from the date of receipt of application."

In pursuance of this direction, the trust filed an application before District Court, Rajkot on 13.2.1996 which was refused by the Collector on 13.8.1996. The Special Civil Application No. 7219 of 1996 challenges the order of the Collector dated 13.8.1996.

6. In the aforesaid circumstances, in the first instance, the later petition may be considered first. Grant of land was made available to the trust subject to condition referred to above. The Collector while considering the application for modification in the said condition, merely by referring to existence of such condition rejected the application. Suffice it to state the Collector has failed to apply his mind at all to the question which he was required to address himself. First question was whether the land has been granted subject to the condition. So far as that question was concerned, Revenue Tribunal has already held that the grant was subject to condition and it also held that it could not have been used for any other purpose except with the permission of the competent authorities in accordance with law. The Collector was really required to consider this later question whether in the case before it, the applicants should be granted permission to use the land for other purposes than for the purpose of hospital,

keeping in view of the fact that existing hospital has been demolished, new hospital has to be constructed and the trust to whom land has been granted is not endowed with requisite funds to construct the building over it. The Collector has stopped short of interpreting the document and came to the conclusion that the purpose for which land has been allowed. However, he has not entered the field to enquire whether it was a case in which the condition is required to be modified for permitting the allottee or a transferee from him to use the land for the purposes other than hospital when the alienation by the trust is held by competent officer justified or in the charged circumstances Trust itself may be required to put the land for such use in furtherance of its objectives. The order as such therefore cannot be sustained and deserves to be set aside.

Now the petition No. 869 of 1987 be considered:

7. It has been vehemently urged in the first instance by learned counsel for the petitioner that the grant was not subject to such condition and that note which has been put at the back of letter of allotment which has not been initialled and about which it cannot be said with certainty whether the same was put simultaneously at the time of allotment or has been inserted later on, the inference thereon against the petitioner is not warranted particularly in view of the fact that land has been sold to the allottee in absolute terms by use of the word 'aghat vechan'. The original document is not available and the matter has proceeded on secondary evidence by producing a copy of the said document.

8. Having carefully considered the contention raised before me and read the document, I am not inclined to accept the contention of the learned counsel in that regard. The condition referred to above do exist on the copy furnished by the applicant/vendor himself before the authorities. The genuineness of document and existence of condition thereon cannot be doubted. The condition is clear in itself that the land though transferred in the absolute ownership of the allottee but is granted to be used for particular purpose, namely, for the construction of hospital and for the benefit of such hospital. However, the condition is attached with the land and its user. Since the land has been transferred in absolute in favour of the allottee, no restriction on its transfer has been put. Only consequences of this condition be that whether the land remains with the original allottee or goes in the hands of successive transferees, it shall

be subject to the same condition as to use for which allotment has been made. This covenant runs with the land, therefore, in my opinion, the Tribunal was not justified in inferring any impediment on transfer of the land by the trust because of the condition attached to the land for its user and make it subject to decision of revenue authorities. That could affect the right of the purchaser if he wants to put the land to any other use than for the purpose of hospital and its benefit, and the question would really arise only when the transferee wants to put the land for any use other than the hospital. In that event, he may have to apply to competent authority under the revenue laws for the purpose of change in user or for modification in the condition of allotment as to its user. The Tribunal has also found that land could be sold after seeking permission and alteration in condition. This finding is erroneous to the extent it infers transfer subject to modification in condition. The true effect of the condition would be that though there is no impediment under the deed of allotment on the power of allottee to transfer the land, however, the allottee or his transferee will not be able to use the land for any purpose other than hospital or for its benefit unless otherwise permitted by the grantor or his successors in office in accordance with law. It has been held by the Tribunal that such alteration in the condition as to use can be permitted by the revenue authorities if applied for. The application may be made by the person who has acquired right over the land and wants to use it for other than hospital purpose. A transferor is not to oversee or supervise the object and purpose of the purchaser. The purchaser acquires the land with open eyes that land is subject to such condition. He takes upon himself either to use the land for the same purpose or to secure necessary permission for alteration in condition as to use before using it. Therefore to the extent permission of Charity Commissioner has been held to be invalid on the ground that a condition as to particular use has been attached with the land, is erroneous.

9. However, the same cannot be said to be about other reason delineated by the Tribunal. It cannot be doubted that law does not favour divesting of immovable properties of public trust ordinarily. The State Government is paramount guardian of public charity and it is its bounden duty to see that the funds and properties of public trusts are not floundered or misapplied. It is to safeguard the properties of different trusts from being misused provision like the one of seeking

permission before transfer of the property has been made. The principles governing the application for grant of permission to sell the properties of public trust have been well settled. The basic guiding factor for the Charity Commissioner in considering the application for transfer of any immovable property of the public trust is whether such transfer is in the interest of the public trust and for its benefit, and protection. In order to satisfy himself before the Charity Commissioner sanctions alienation of trust property he has to apply his mind to two material questions, namely, (i) whether there is a compelling necessity to justify the alienation in question and (ii) whether the proposed alienation is fair and does in any way adversely affects the interest of the trust. The first enquiry is into the factors which have necessitated the transfer of the immovable property and the second question envisage inquiry into the fairness of proposed transaction. That is to say, whether it results in the best yield to the trust from its property. The position has been succinctly stated by Shah, J in *Thakorebhai Gangaram v. Ramanlal Maganlal Reshamwala* reported in 1993(1) GLH 473:

"While exercising these powers under Section 36, the Charity Commissioner has first to consider as to whether the proposed alienation of trust properties is in the interest of the trust. In order to answer that question the Charity Commissioner is required to find out the need on the part of the public trust to dispose of or to alienate the property. Once the need is established the Charity Commissioner would have also to consider various other factors. The wording of Section 36 clearly indicates that a very important duty is cast upon the Charity Commissioner. The provision indicates that in case in which the trust deed confers upon the trustees the power to alienate trust's property whenever necessary, sanction of the Charity Commissioner would be necessary. It is very obvious that before Charity Commissioner sanctions alienation of trust property he has to apply his mind to following material questions, namely (i) whether there is a compelling necessity to justify the alienation in question (ii) whether the proposed alienation is fair and just?, (iii) whether the proposed alienation, in any way, adversely affects the interest of the trust?

The appellate Tribunal has addressed itself to

this question and found that though need of the trust for raising funds for the purpose of hospital building which has been razed to ground during communal riots is established, the Charity Commissioner has not applied its mind to other questions relevant for the purpose of granting sanction for transferring the entire land of over 26000 sq.yds. for a sum of Rs.45.00 lakhs. Extent of existing need and means by which such need can be satisfied are essential ingredient of such enquiry. It is pointed out that while considering the case, the Charity Commissioner has not considered whether the need for which property is sought to be sold can be met by transfer of the part of the property or it needs to be transferred as a whole, whether the transfer of the whole property or a part of it will be more beneficial. The Tribunal has pointedly referred to the fact that the hospital is constructed on very small piece of land compared to the land which is sought to be parted with. Hospital was existing in the heart of the city catering the needs of people within the city. It cannot be said that the Charity Commissioner has applied its mind that the hospital can be constructed over the very land after permitting the trust to part with part of the land after retaining the land for the construction of the hospital, and for permitting additional shops to be constructed to augment its income. If the requisite need can be fulfilled in any other manner or through other modicum without having recourse to proposed alienation wholly or partially, obviously the sale of entire property would not be justified by application of two principles referred to above. Whether shifting of a public utility like hospital, to other place unless absolutely warrants too was a relevant consideration in the facts and circumstances of present case. The existing hospital building was on a small portion of the entire land. New building is proposed on merely 2400 sq. mts. of land. Property sought to be sold is over 26000 sq. mts. It is germane to consider, whether need to sale of entire open land necessitating shifting of hospital from the present site, if the need for money can be fulfilled by alienation of lesser property is compelling one?

10. From the order of the Tribunal it is also apparent that while the sanctioned transfer is for a sum of Rs.45.00 lakhs, the trustees had entered into a transfer before seeking permission for a sum of Rs.60.00 lakhs. The Commissioner in his submissions before the Tribunal has stated that he was not made aware of the previous transaction at all. The explanation now furnished before this court by learned counsel for the petitioner is that the earlier transfer was for entire

property inclusive of shops and the sanctioned transaction is only for the open land. The fact remains that the Commissioner before grant of permission for sale of property for 45 lakhs was not made aware of preexisting transaction, which had sufficiently higher sum offered and he had no occasion to consider its veracity and effect on his decision. It cannot be said that the consideration of the Tribunal was not germane. In considering the compelling necessity to justify the transfer in question, the enquiry is to find the need on the part of the public trust to dispose of or to alienate the property. That also includes the extent of property required to be sold for that purpose or the type of transaction for alienation for raising the requisite funds that may be in the best interest of trust.

11. Apart from the reasons stated in the order of the Tribunal, it is apparent from the statement of facts noticed above that the need pleaded was of about Rs.20.00 lakhs for constructing a hospital. No other requirement for raising funds had been referred to in the application or in the orders. Yet, the property sought to be sold was worth far more than that and same has been permitted to be without considering the alternatives for raising the required funds by different methodology, some of which are suggested in the Tribunal's order. This does go to show that the Commissioner before grant of permission has not applied his mind properly to the questions germane for considering the application for such permission.

12. That being the position, the ultimate order of the Tribunal though it may be erroneous on one ground is not liable to be interfered with in extraordinary jurisdiction by way of examining the order as a court sitting in appeal. However, to the extent the Tribunal directed to get proper sanction before selling the land from revenue authorities of the district is concerned, I have already concluded the order is erroneous, inasmuch as the revenue authority's jurisdiction would be to the extent for altering the condition of its user in case such permission is sought before putting the land to other use than the hospital or for the benefit of the hospital, but no impediment on the power of holder to transfer the land has been placed in letter of grant and that cannot be inferred from the condition attached to its user. That permission about alteration in condition to user had to be sought by the person who wants to use the land for purposes other than the use for which it has been granted. When such application is made for alteration in condition it is made on the premise that

such condition as to user exists and there is a need felt for its change. The authority will not be entitled to reject that application by simply pointing out the existing condition but it will have to apply its mind whether that condition is required to be modified in the circumstances placed before it for the purpose of utilisation of the land by the person who holds it in due course, after acquiring the same in accordance with law. In the matter of transacting the land which vests absolutely in the allottee, the revenue authorities' interference does not come in between, simply on the ground of existing condition which does not affect their right to alienate.

13. In the result, the Special Civil Application No. 869 of 1987 is partly allowed. The order as to setting aside the grant of permission in favour of the petitioner by the Jt. Charity Commissioner is not interfered with. The direction to the extent it requires the trustees to approach revenue authorities for seeking permission to transfer the land in question is set aside. As the Tribunal itself has found the need to raise funds and alienate the property for that purpose but the extent and manner to which the property is required to be alienated has not been considered, it is only appropriate that the Charity Commissioner be directed to decide the question afresh on the application of the trust on the question of permitting the property to be alienated. It may be pointed here that learned counsel appearing for the trust candidly stated that trust today is also not possessed of sufficient funds to raise hospital on its own and still needs to raise funds by transfer of immovable property. Before parting with the case, it may be noticed that learned counsel for the petitioners has urged that as a result of sanction granted in its favour he has already paid Rs.9.00 lakhs as a part of consideration to the trust which it has utilised but since the setting aside of the permission in his favour by the Tribunal, neither the amount has been returned to it nor the permission exists in his favour, he may be refunded the amount with interest in case permission is not ultimately granted by the Charity Commissioner to the proposed transaction or he is not able to make offer equal to other offers in case property in question or part of it is put to auction by the Charity Commissioner to fetch the present market price, for the benefit of trust, he may be refunded the amount paid by him to the trust out of the amount so recovered, or the trust may be directed to refund the amount. Since the petitioner is not relinquishing his right to be considered for the alienation to be made in his favour it would be premature to decide on this issue

at this juncture. This question may also be decided by the Charity Commissioner in the light of decision taken by him on the application.

Accordingly Special Civil Application No.7219 of 1996 is allowed and order of the Collector dated 13.8.96 is quashed. The Special Civil Application No. 869 is disposed of with direction to the Jt. Charity Commissioner to decide the application of the Trust for alienating its immovable property in question in accordance with law subject to and in the light of observations made above.

There shall be no orders as to costs.

(Rajesh Balia, J)